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BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

P.T. INTERNATIONAL NICKEL INDONESIA v. GENERAL TRADING CORPN. (M) SDN. BHD.

[C.A. (Chua, Kulasekaram & D'Cotta JJ.) May 12, 1977]
[Singapore — Civil Appeal No. 37 of 1976]

Practice and Procedure — Summary judgment — Triable issues — Leave to defend — R.S.C., 1970, O. 14.

Contract — Corrupt and illegal contracts — Corruption of agent — Right to recover excess of price — Damages for fraud — Unjust enrichment.

The respondents had claimed the sum of M$373,586.52 being the price of timber sold and delivered to the respondents. The appellants alleged that the purchase price for the timber was inflated because of the conspiracy, fraud and corruption of agents acting on their behalf and allegedly on behalf of the respondents. The Registrar gave leave to the respondents to sign final judgment for the sum claimed and costs and an appeal to the High Court was dismissed. The appellants appealed to the Court of Appeal.

Held, allowing the appeal: (1) if the allegations of the appellants could be established they have a good defence to the action and a good counterclaim and set-off which exceeded the respondents' claim;

(2) it was plain on the affidavits that there were triable issues and therefore leave to defend should have been given.

Cases referred to:-

(1) *Mayor of Selford* v. *Lever* [1891] 1 Q.B. 168.
(2) *Hovenden and Sons* v. *Millhoff* (1900) 83 L.T. 41.
(3) *Grant* v. *Gold Exploration & Development Syndicate Ltd.* [1900] 1 Q.B. 233.
(4) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32.
(5) *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha & Telegraph Works Company* (1875) 10 Ch. App. 515, 527.
(6) *Bone* v. *Ekless* 157 E.R. 1450.
(7) *Harrington* v. *Victoria Graving Dock Co.* (1878) 3 Q.B.D. 549.

COURT OF APPEAL.

Francis Patrick Neill Q.C. (*Christopher Law* with him) for the appellants.

Dennis Murphy (*Robert Wee* with him) for the respondents.

Chua J. (delivering the judgment of the Court): At the end of the hearing of this appeal we allowed the appeal with costs and indicated that we will give our reasons in writing at a later date. We do so now.

The appellants in this case, P.T. International Nickel Indonesia, were sued by the respondents, General Trading Corporation (M) Sdn. Bhd. for the sum of Malaysian $373,586.52 (equivalent to Singapore $366,114.79) being the price of timber sold and delivered under four Purchase Orders dated October 25, 1975, November 13, 1975, November 25, 1975 and November 28, 1975.

The respondents sought summary judgment under Order 14. The Registrar gave the respondents leave to sign final judgment in the sum claimed and costs. On appeal to the Judge in Chambers the learned Chief Justice upheld the Registrar's decision.

There is no dispute as to the terms of the contracts and as to delivery. A series of transactions took place between the parties in the period February 1974, to November 1975, (a total of some thirty-five contracts of sale) whereby the respondents sold and the appellants bought timber for shipment to Indonesia for a total invoiced price of Singapore $3,632,730, all of which said sum has been paid apart from the sum of Malaysian $373,586.52 now claimed by the respondents in respect of the four Purchase Orders as set out above.

The defence set up was that these thirty-five contracts were arranged by one D.S. Calvert, the then purchasing officer of the appellants, acting on behalf of the appellants and one Panjwani acting on behalf of the respondents; that the price charged for the timber was nearly double its fair market price (which is put at S$1,790,355); that the prices comprised in the thirty-five contracts "were knowingly and wilfully inflated beyond the fair market price aforesaid and the price charged by the plaintiffs in respect of *bona fide* transactions by virtue of a fraudulent conspiracy between Calvert and the said Panjwani"; that the respondents "have to the extent of S$1,468,808.48 been unjustly enriched thereby"; and that the respondents "knew or ought to have known that they were being unjustly enriched as aforesaid and cannot now be heard to say that they are entitled to the said sum of M$373,586.52"; that the respondents "are in any event liable for the fraud of the said Panjwani who was their servant or agent in respect of the transactions the subject of the said Purchase Orders"; that "the contracts on which the plaintiffs are suing were corrupt and illegal bargains entered into contrary to public policy and in violation of statute"; that the said contracts are void; that if the said contracts are not void they are voidable and "the defendants hereby elect to avoid and/or rescind the same."

The appellants counterclaim the sum of S$1,468,-808.48 "being monies had and received to the use of the defendants and/or being the sum by which the plaintiffs have been unjustly enriched."

The appellants allege that the reason for the excessive purchase price was that Calvert and Panjwani fraudulently conspired together knowingly and wilfully to inflate the price and that Calvert's motive for accepting the inflated prices was that he received a secret commission or bribe in respect of each purchase; that Panjwani was a commission agent and was the respondents' representative in Singapore and it is a fair inference from the evidence that the higher the purchase price the greater would be Panjwani's commission; that most of the transactions were arranged in violation of the proper procedure, namely that competitive bids to be obtained and the lowest trade tender to be chosen.

The appellants say that they began to investigate the transactions in January 1976, making use of their auditors, Messrs. Price Waterhouse & Co. for this purpose; that in February 1976, they first learned of the fraudulent activities of Calvert and Panjwani when they found that another timber supplier of theirs, American Timber Products Inc./Woodtech Services Pte. Ltd., had charged them grossly inflated prices and that Panjwani and Calvert were also involved in this matter and had an arrangement for sharing the difference between the market price and the bid price, 50% going to the supplier and 50% to Panjwani who would pay half of his percentage to Calvert; that on ascertaining the facts they declined to pay the respondents the outstanding balance claimed.

The respondents deny these allegations of the appellants and say that the contracts were entered into in response to the appellants' invitation for bids to supply timber; they say that their bids were telexed directly to the appellants and they deny that Panjwani was their employee but say that Panjwani was a commission agent.

The learned Chief Justice appears to have proceeded on the basis that even if the appellants proved all the facts which they allege there would still be no basis for a defence to the action or for a counterclaim. The learned Chief Justice said in his grounds of decision:

"In my judgment, the defence of unjust enrichment must clearly fail in law even on the defendants' version of the facts. As regards the alternative defence based on the alleged fraud of Panjwani I was of the opinion that the mere allegation of fraud on the part of Panjwani was insufficient having regard to the undisputed facts relating to the contracts sued upon. Accordingly, I dismissed the appeal."

The question then arises, assuming that the allegations of the appellants can be established, what are the legal consequences?

Calvert as the agent of the appellants acted in gross dereliction of his duty. By agreeing to accept bribes he put himself in a position where his duty and his interests were in conflict. The irresistible inference is that Calvert was corrupted and consequently agreed to accept or recommend the excessive prices.

What then are the rights of the principal where the agent is bribed? The position is well-established on the authorities and is thus stated in *Bowstead* on Agency, 14th Ed., page 348, Article 110:

"(1) Every contract made or act done by an agent under the influence of bribery, or, to the knowledge of the other contracting party, in violation of his duty to his principal, is voidable by the principal.

(2) Where an agent is induced by bribery to depart from his duty to his principal, the person who bribed the agent is liable jointly and severally with the agent to the principal for any loss incurred by him in consequence of that breach of duty, without taking into account the amount of the bribe, or any part of it that may have been recovered by the principal from the agent as money received to his use."

The respondents deny that Panjwani was their employee but they say that "he was merely a commission agent", and that "he had no say whatever in the contract price." On proof that Panjwani acted for them in the transactions the respondents are liable for his actions.

Do the appellants have a cause of action in respect of the excess price already paid? There are authorities covering the position where the price has been inflated as a result of improper dealings between the seller and the buyer's agent — *Mayor of Selford* v. *Lever*[1] and *Hovenden & Sons* v. *Millhoff*.[2]

In the *Mayor of Selford's* case the plaintiffs were proprietors of the gasworks in their borough and one Hunter was employed by them as the manager of their gasworks, and in that capacity it was his duty to examine tenders for the supply of coals for the purpose of the gasworks. The defendant Lever was a coal merchant who submitted to the plaintiffs tenders for the supply of coal. Before submitting the tenders and with the view of inducing Hunter to advise the plaintiffs to accept them, the defendant corruptly agreed to pay to Hunter a secret commission or bribe of one shilling per ton on the quantity of coal tendered for, and, in order to recoup himself for the commission so promised to Hunter, he inserted in the tenders prices which were in excess of the prices at which he would otherwise have tendered by one shilling per ton. Thereupon, Hunter being induced thereto by the promise of the commission, advised the plaintiffs to accept the defendant's tenders, which they accordingly did. When the plaintiffs discovered the frauds which had been committed upon them they first commenced action against Hunter to recover from him the amount of the bribes which he had received. The plaintiffs then commenced an action against Lever claiming to recover from him the sum of £2,329 as damages for fraud in relation to contracts for the supply of coal by him to the plaintiffs; and in the alternative, as money had and received by him to the plaintiffs' use.

Lopes L.J. in his judgment said (at page 181): —

"The rights of action by the corporation against him (Lever) and Hunter are separate, distinct and independent of each other. The right against Hunter is, to recover the secret bribe which he has received, and it is founded on his fraud in regard to that bribe. The right against Lever is, to recover the excess of price which he obtained through his fraud — a fraud, no doubt, in conjunction with Hunter, but an entirely separate and distinct fraud from that in respect of which the action against Hunter would be brought."

It appears that there are two views as to the true analysis of the defrauded purchaser's cause of action against the vendor. On one view it is an action for damages for fraud (*per* A.L. Smith L.J. in *Grant* v. *Gold Exploration & Development Syndicate Ltd.*,[3] at page 245). On another it is a quasi-contract for monies had and received (*per* Williams L.J. in the *Hovenden* case (above) at page 43). The learned authors of the latest edition of *Halsbury's* Laws of England suggest that both views are correct (see 4th Ed. Vol. 1: Agency, Paragraph 836 note 3).

In the case of *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*,[4] the claim was to recover a prepayment of £1000 made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. Lord Wright in his judgment said (at page 61): —

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

Lord Wright ended his analysis by saying (at page 64):

"In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available, as they were found to be in *Sinclair* v. *Brougham*."

It is well-established that the defrauded principal is entitled when he becomes aware of the true facts, at his option, to have the contract rescinded. As James L.J. said in *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha & Telegraph Works Co.*[5] at page 527:

"I am of the opinion that where anything in the nature of a fraud in the eye of this court is committed, a man has a right at once to sever the connection; and I cannot bring my mind to doubt, that if you find a case where, in the contemplation of this court, a principal is conspiring with the servant of the other principal to cheat his master in the execution of a contract, then in common sense, common justice, common honesty, and in this court, the master is entitled to say, 'I will have nothing more to do with the business;' and in this court a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty."

The appellants desire to raise in this action that the contracts sued upon are corrupt and illegal and contrary to public policy. They submit that it would be contrary to public policy to permit recovery in this case.

It is clear law that the contract between the briber and the recipient of the bribe is an illegal contract and it cannot form the basis of a claim before the courts (see *Bone* v. *Ekless*[6] and *Harrington* v. *Victoria Graving Dock Co.*[7]).

Here the respondents are suing for a price which the appellants allege was fraudulently agreed between them and the appellants' dishonest servant. It is submitted by the appellants that the court will not lend its aid to such a claimant suing for the fruits of dishonesty.

We were of the view that if the allegations of the appellants can be established the appellants have a good defence to the action and a good counterclaim and set-off which exceeded the respondents' claim.

At the present stage there is a considerable conflict of evidence. The specific examples of conflict concern the roles played respectively by Calvert and Panjwani. The respondents have not said what the precise role of Panjwani was. The appellants have in their affidavits set out as to how the respondents' prices compare with the fair market price. The respondents on the other hand have made no similar effort but they contented themselves at this stage with a bare denial and a counter charge. Obviously the conflict of evidence can only be resolved by a trial.

It is quite plain on the face of the affidavits that have been filed that there are triable issues.

For these reasons we allowed the appeal.

Appeal allowed.

Solicitors: *Rodyk & Davidson; P.T. Wong & Co.*

KHOO CHIANG POH v. COSMIC INSURANCE CORPN. LTD.

[C.A. (Chua, Choor Singh & Rajah JJ.) July 20, 1977]
[Singapore — Civil Appeal No. 10 of 1976]

Companies — Pre-incorporation contract — Whether ratified by resolution of company — Companies Act (Cap. 185), s. 35(1).

In this case the learned trial judge was invited by counsel for both parties to decide on two preliminary issues. The first was whether a letter signed by twelve persons including the appellant constituted a pre-incorporation contract between the appellant and the other eleven persons, as agents for the respondent company which was subsequently incorporated, under which the appellant was constituted Managing Director for life. The second issue was whether the contract had been ratified by resolution of the defendant's directors. The learned trial judge answered both questions in the negative. The appellant appealed.

Held: (1) the letter clearly set out the agreement which had been reached that the appellant should be the Managing Director for life;

(2) the pre-incorporation contract had been ratified by the resolution of the company;

(3) the substance of the letter fell within the ambit of section 35(1) of the Companies Act and was duly ratified by the said resolution.

COURT OF APPEAL.

Appellant in person.

J. Grimberg for the respondents.

Rajah J. (delivering the judgment of the Court): At the end of the hearing of the appeal we allowed the appeal and said that we would give our reasons later. We do so now.

The learned trial judge at the commencement of the trial in Suit 203 of 1974 was invited by counsel of both parties to decide on two preliminary ques-